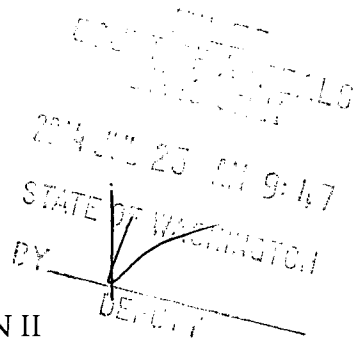

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 45810-1-II

In re the Marriage of

Daniel E. Bunch,

Respondent,

and

Tamara N. Lee

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

BRIEF OF RESPONDENT DANIEL E. BUNCH

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ORIGINAL

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Introduction

This case arises out of some of the most basic tasks of an attorney: preparing an unsworn declaration, and submitting evidence to the court for consideration on a motion. Tamara N. Lee asked the trial court to find her ex-husband, Daniel E. Bunch, in contempt of court for failure to pay child support and other child-related expenses following their marriage dissolution. Ms. Lee's motion and declaration were not made under penalty of perjury under the laws of the state of Washington. Except for being signed, Ms. Lee's materials met none of the requirements for unsworn declarations provided in RCW 9A.72.085. Upon being notified of this and other defects in her motion, Ms. Lee and her attorney refiled the motion, with slight adjustments, at least two more times. When the motion was finally heard by the court in November of 2013, the court struck Ms. Lee's materials because they were not made under penalty of perjury, not made based upon personal knowledge, and consisted of hearsay. Finding there was no factual basis for the motion, the court also imposed $1,040 in CR 11 sanctions against Ms. Lee's attorney, Eva Carleton. Ms. Lee and Ms. Carleton now appeal. Mr. Bunch asks that the trial court decision be affirmed and that he be awarded fees for responding to this frivolous appeal.

Statement of Issues

1. What is the standard of review for trial court decisions regarding contempt and the award of CR 11 sanctions?

2. Did the trial court properly exercise its discretion by excluding from evidence unsworn statements not made under penalty of perjury, and exhibits not otherwise admissible under the rules of evidence?

3. Even if the court considered the materials submitted by Ms. Lee, was there substantial evidence to support the court's conclusion that Mr. Bunch was not in contempt where Ms. Lee's materials showed Mr. Bunch either paid the amounts in dispute, or where Ms. Lee failed to demonstrate the expenses were reasonable and necessary?

4. Was it proper for the trial court to deny Ms. Lee's request for attorney fees when the trial court did not find Mr. Bunch in contempt of court, and when an award of fees for contempt is discretionary?

5. Should the trial court's award of CR 11 sanctions against Ms. Carleton be affirmed when, applying an objective standard, the motion for contempt was not based upon any admissible facts, and when the sanctions partially compensated opposing counsel for responding to the frivolous motion?

6. Should Mr. Bunch be awarded fees and costs for responding to a baseless appeal?

Statement of the Case

This appeal follows the trial court's denial of a request for a finding of contempt against Mr. Bunch, and granting CR 11 sanctions

against counsel for Ms. Lee. CP 671-693. Mr. Bunch and Ms. Lee were married July 7, 2003. CP 67. They have one daughter, age 6. CP 70. Mr. Bunch filed a petition for dissolution of marriage and a temporary order of child support was entered November 9, 2012. CP 1-16. The temporary order required Mr. Bunch to pay temporary child support of $720.05 per month, plus his proportionate share (78%) of daycare, education expenses, and long distance transportation. *Id.*

On May 24, 2013, following trial, the court entered final dissolution orders, including a final order of child support. CP 44-77. The final order of child support requires Mr. Bunch to pay support of $300 per month, plus his proportionate share of work-related, licensed daycare jointly agreed to by the parties. CP 46-48. Back support was not addressed by the final order of child support. CP 53.

On August 16, 2013, Ms. Lee filed a motion for contempt against Mr. Bunch, alleging he failed to pay $3,654.68 for child support, daycare, medical expenses, maintenance, and property division between November 2012, and July 2013. CP 78-187 (see particularly CP 78, 103). Counsel for Ms. Lee did not obtain an order to show cause or note the motion on the correct docket. CP 189, 201, 342; RP (11/14/13) 40. The motion for contempt was signed by both Ms. Lee and her attorney and stated, "The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 15th day of August, 2013." CP 84. Approximately 100 pages of exhibits were attached to the motion comprising copies of WACs, checks,

handwritten notes, charts, receipts, and other miscellaneous documents. CP 86-187.

On August 19, 2013, counsel for Mr. Bunch asked counsel for Ms. Lee to withdraw the motion for contempt. CP 191. Mr. Bunch's attorney pointed out that the statement in support of contempt was not properly signed, that counsel for Ms. Lee acted as a witness , and that Mr. Bunch was current in his support obligations. CP 191-192. Counsel for Mr. Bunch notified counsel for Ms. Lee that CR 11 sanctions would be sought if the motion was not withdrawn. CP 191. The motion was not withdrawn and on August 23, 2013, Mr. Bunch responded to the motion for contempt and moved for CR 11 sanctions against counsel for Ms. Lee. CP 188-208.

Ms. Lee filed another motion for an order to show cause regarding contempt on September 19, 2013. CP 209-333. This motion stated that Mr. Bunch owed $3,210.94 for child support, daycare, medical expenses, maintenance, and property division between November 2012, and July 2013. CP 210, 237. Like the first motion, this motion was signed by both Ms. Lee and her attorney and stated, "The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 19th day of September, 2013." CP 218. The second motion for contempt contains over 100 pages of exhibits, most of which appear to be the same documents attached to the first motion. CP 220-333. On September 26, 2013, counsel for Ms. Lee filed an additional exhibit consisting of 30

pages of emails between her attorne[illegible] within (?) s handbook. CP 368-398. The first pag[illegible] as signed by Ms. Lee's attorney who sta[illegible] ıitted this 26th day of September, 2013." Cl[illegible]

Due to the procedural irregularities with the motions, they were stricken by the court on September 27, 2013. CP 406-408, 580, 725. The court ordered that Ms. Lee's motion could be, "refiled as appropriate." CP 407. Similarly, Mr. Bunch's motion for CR 11 sanctions was reserved. *Id.* Following the hearing Ms. Carleton attempted to address the court again, and was warned that sanctions would be ordered if she returned to court that day without an emergency. CP 725.

Ms. Lee filed a third motion for contempt on October 4, 2013. CP 409-579. This motion alleged that Mr. Bunch was delinquent for child support, daycare and medical expenses of $2,031.86, and pension plan payments (property division) of $1,179.08. CP 410. These two amounts total $3,210.94. *Id.* Ms. Lee also requested interest of $199.72, and attorney fees of $1,800. This motion appears to be the same motion filed in September and was signed by both Ms. Lee as follows: "The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 19th day of September, 2013." CP 419. Over 150 pages of exhibits were attached to this motion, consisting primarily of the same exhibits attached to the two previous motions. CP 420-579.

At oral argument on November 14, 2013, Ms. Lee acknowledged that Mr. Bunch made the property settlement payments for the retirement account and withdrew that portion of her motion. RP (11/14/13) 17, 20-21; CP 581, 589-590. There was also discussion between Ms. Lee's attorney and the court whether there was sufficient information in the record to determine if the daycare expenses Ms. Lee was requesting reimbursement for were work-related. RP (11/14/13) 25-26. After hearing oral argument, the court concluded that the materials submitted by Ms. Lee were not in the form of a declaration or affidavit, and therefore did not constitute evidence. RP (11/14/13) 61-62. Similarly, the court found that except for the attached court orders, the exhibits to the motion were inadmissible hearsay. *Id.* Because there was no evidence to support Ms. Lee's motion, her motion was denied. *Id.* The court then awarded CR 11 sanctions because the motion was not properly supported by admissible evidence. *Id.* The court also expressed concern over, "the intertwinement of the attorney as witness in this case." RP (11/14/13) 62. The court awarded $1,040.00 in CR 11 sanctions against Ms. Carleton, observing this was a first sanction and therefore the greater amount requested by Mr. Bunch's attorney was not appropriate. RP (11/14/13) 62.

Written orders denying the motion for contempt and awarding CR 11 sanctions were entered December 20, 2013. CP 608-615. Counsel for Ms. Lee submitted proposed orders but they were not on the mandatory forms. RP (12/20/13) 3; CP 644-646. On December 30, 2013,

Ms. Lee moved for reconsideration. CP 616-632. Like the previous motions, this motion was signed by both Ms. Lee and her attorney, preceded by, "Sworn to as true and accurate, and subject to the perjury laws of the State of Washington, this 30th day of December, 2013," CP 632. The court denied the motion for reconsideration without argument on January 6, 2014. CP 639-641.

Ms. Lee and her attorney now appeal the order denying her motion for contempt and awarding CR 11 sanctions. CP 671-693.

Argument

1. The standard of review is whether there was substantial evidence to support the trial court's decision on the contempt motion and whether the trial court abused its discretion in excluding evidence and imposing CR 11 sanctions.

Deference should be given to both the trial court's decision on contempt, and granting CR 11 sanctions against Ms. Carleton. A trial court's decision on family law contempt motions is reviewed for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-352, 77 P.3d 1174 (2003). A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007). Similarly, the abuse of discretion standard applies to trial court decisions to impose CR 11 sanctions. *Stiles v. Kearney*, 168 Wn. App. 250, 277 P.3d 9 (2012). Applying the abuse of discretion standard, a trial court decision should only be overturned if it is manifestly unreasonable or based on untenable grounds or untenable

reasons. *In re the Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Speaking generally about dissolution cases, the Washington Supreme Court observed:

> Trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.

In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P. 2d 214 (1985).

2. The trial court did not abuse its discretion by excluding unsworn statements and exhibits that were not admissible under the rules of evidence.

Motions must be supported by admissible evidence. Kitsap County Local Rule 7 states that a motion, "and any supporting affidavits or other documents on a motion," must be filed with the court. KCLCR 7(b)(1)(A). The Civil Rules also refer to the use of affidavits to support motions. CR 7(b)(4). Before testifying, every witness must declare by oath or affirmation that he or she will testify truthfully. ER 603. The oath or affirmation is to be administered to impress upon the witness the importance of testifying truthfully. *Id.*

For sworn testimony to be accepted in court proceedings, an oath must be administered by the court, judge, clerk, court reporter, or notary public. RCW 5.28.010. Although some documents filed by Ms. Lee contain the words, "sworn to," there is no evidence these were

sworn to under an oath administered by any of the individuals authorized to take testimony in court proceedings. *Id.*

Alternatively, whenever a rule requires the use of a sworn affidavit, an unsworn declaration may be used as long as it complies with RCW 9A.72.085. GR 13. The unsworn declaration must contain at least the following:

> (1) Recit[ation] that it is certified or declared by the person to be true under penalty of perjury;
> (2) Is subscribed by the person;
> (3) States the date and place of its execution; and
> (4) States that it is so certified or declared under the laws of the state of Washington.

RCW 9A.72.085. The statute gives an example that meets these requirements. *Id.* If the document does not contain language that it is certified or declared to be under penalty of perjury, then it does not constitute evidence or "proof" under the statute. *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011); *See also Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 300 P.3d 431 (2013) (on summary judgment an unsworn statement that does not contain the four requirements of RCW 9A.72.085 cannot be used to establish disputed facts).

The record contains ten different attestation clauses used by Ms. Lee or her counsel. Two were prepared and signed after sanctions were granted. The clauses and their location in the record are:

Clause	Location
The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 15th day of August, 2013.	CP 84
The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 19th day of September, 2013.	CP 218
Respectfully submitted and sworn to as true and accurate to the best of my information and belief, this 25th of September, 2013.	CP 341
Respectfully submitted this 26th of September, 2013.	CP 368
Sworn to as true and accurate this 26th day of September, 2013.	CP 405
The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 19th day of September, 2013.	CP 419
Sworn to and certified as true and accurate to the best of my knowledge and information.	CP 598
Sworn to as true and accurate this 26th day of September 2013.	CP 601
Sworn to as true and accurate, and subject to the perjury laws of the State of Washington, this 30th day of December, 2013.	CP 632
Submitted and affirmed to be true and accurate to the best of my knowledge and information this 17th day of January, 2014.	CP 643

The first requirement of an unsworn statement is that it be made under penalty of perjury. RCW 9A.72.085. Only one of the ten attestation clauses above was made under penalty of perjury. CP 632. That statement was dated December 30, 2013, more than a month after sanctions were ordered. CP 632; RP (11/14/13) 61-62.

The second requirement of an unsworn statement is that it be subscribed, or signed. RCW 9A.72.085. All statements were signed by Ms. Lee or her attorney, so this requirement is satisfied.

The third requirement is that the date and place of execution must be noted on the unsworn statement. RCW 9A.72.085. All of the statements contain a date, but none indicate a place of execution.

Finally, the unsworn statement must state it is certified or declared under the laws of the state of Washington. RCW 9A.72.085. Only one of the ten statements above is made under the laws of the state of Washington. CP 632. But this statement was dated December 30, 2013, more than a month after sanctions were granted.

None of the eight statements filed by Ms. Lee or her attorney prior to CR 11 sanctions being granted complied with the requirements of RCW 9A.72.085. Of the four requirements in the statute, the only requirement satisfied is the requirement that they be subscribed. Because the statements submitted by Ms. Lee were not evidence, the trial court properly excluded them. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 300 P.3d 431 (2013); *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011).

Ms. Lee argues that her failure to comply with the statute should be excused because the statute says, "The certification or declaration *may* be in *substantially* the following form...." RCW 9A.72.085 (emphasis added); Brief of Appellants, pg. 30. But this phrase introduces sample language for a proper certification or declaration. This phrase does not do away with the four requirements that precede it. And even if substantial compliance with the four requirements in the statute is all that is required, she has not substantially complied because she only included three of the four required elements in her documents.

Ms. Lee next argues what is important is that the witness be impressed with the importance of testifying truthfully, regardless of her failure to comply with the statute. Brief of Appellants, p. 30. It is true that ER 603 requires an "oath or affirmation is to be administered in a manner that will impress upon the witness the importance of testifying truthfully." ER 603. But the language employed by Ms. Lee in her documents dilutes the importance of testifying truthfully. Except for the one document filed after sanctions were awarded, none of the phrases used by Ms. Lee refer to her statements being made under penalty of perjury, or even being subject to Washington law. RCW 9A.72.085. Most of the phrases used by Ms. Lee refer to her statements being truthful, "to the best of her knowledge and information." CP 84, 218, 341, 419, 643.

The attestation clauses used by Ms. Lee beg the question, what knowledge and information is she basing her statements upon? This is

the other problem with her filings. On their face, large portions of the pleadings are not based upon personal information, and contain multiple layers of hearsay. Such statements are not admissible evidence. ER 602, ER 801, ER 802, ER 805.

Appellants also argue that they should have been given an opportunity by the court to mitigate their errors and correct their defective pleadings. Brief of Appellants, pp. 31-32. But appellants had notice and an opportunity to correct their errors. By letter dated August 19, 2013, Ms. Carleton was notified by Mr. Bunch's attorney that the declaration was defective and that sanctions would be requested. CP 191. In support of the motion for sanctions, counsel for Mr. Bunch pointed out that appellants' statements were not made under penalty of perjury. CP 201. By order dated September 27, 2013, the court said that the motion could be re-set "as appropriate." CP 407; *See also* CP 580. By declaration dated November 12, 2013, Mr. Bunch again pointed out the materials submitted by appellants were not made under penalty of perjury. CP 602.

As an attorney, Ms. Carleton has a duty to provide competent representation in legal matters. RPC 1.1. That basic level of competence should include knowing how to prepare an affidavit or unsworn declaration. Whether an attorney or litigant, individuals are deemed to know the law. *Retired Public Employees Council of Washington v. State, Department of Retirement Systems*, 104 Wn. App. 147, 152, 16 P.3d 65 (2001). Appellants were on notice of the defects in their pleadings,

which is all that should be required. The court should not be required to take affirmative steps to correct appellants' errors for them. *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 700–701, 958 P.2d 1035 (1998) (notice and an opportunity to correct an error must be given, but the court did not correct the error itself).

Finally, appellants argue that their technical failure to comply with the evidence rules and RCW 9A.72.085 did not result in prejudice and therefore should be overlooked. Brief of Appellants, pp. 32-33. To support this argument, appellants first cite a criminal case where the court held that a letter objecting to a timely trial setting constituted a motion. *City of Kennewick v. Vandergriff*, 45 Wn. App. 900, 901, 728 P.2d 1071 (1986), *reversed* 109 Wn.2d 99 (1987). However, *Vandergriff* did not address whether failure to comply with evidence rules can be excused if there has been no showing of prejudice. Appellants also cited *Manius v. Boyd*, 111 Wn. App. 764 (2002), *IBF, LLC v. Heuft*, 141 Wn. App. 624 (2007), and *Colorado National Bank v. Merlino*, 35 Wn. App. 610 (1983), to support their argument that prejudice must be shown. Again, none of these cases discuss a requirement that the other party demonstrate prejudice when the moving party fails to submit admissible evidence. Each case addresses technical defects in *motions*. None address a party's failure to submit admissible *evidence* to support the motion.

Nevertheless, the prejudice to Mr. Bunch had appellants' materials not been stricken is that the court would have based its ruling

on facts not properly supported or proved. The purpose of the evidence rules are to, "... secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." ER 102. Submitting the materials as they did, appellants caused unjustifiable expense and delay, which is also demonstrated by the fact the same motion was noted three of four times to no avail.

3. Even if the evidence submitted by Ms. Lee was admissible, the court did not abuse its discretion by finding Mr. Bunch was not delinquent in his financial obligations.

The materials submitted by Ms. Lee to support her motion supported no finding of contempt. In her final motion for contempt, Ms. Lee alleged that Mr. Bunch owed $3,210.94. CP 410 (line 5). This amount allegedly represented $2,031.86 for unpaid child support, daycare, education expenses, and medical expenses, and $1,179.08 for unpaid division of a pension. CP 410 (lines 13-16). At oral argument Ms. Lee's attorney conceded that Mr. Bunch no longer owed $1,179.08 for division of the pension. RP (11/14/13) 17, 20-21; CP 581, 589-590. This payment for division of the pension was not reflected on Ms. Lee's chart. *Id.*; CP 437. Therefore the only issue at the time of hearing was whether Mr. Bunch owed $2,031.86 for child support, daycare, education expenses, and medical expenses for November 2012 through August 2013. RP (11/14/13) 6, lines 19-21.

According to Ms. Lee, Mr. Bunch paid at least $9,364.00 either directly to her, or through the Division of Child Support between November 2012 and the beginning of September 2013. CP 437 ("total paid" row plus $382.96 direct payment in September); *See also* CP 356. This did not account for the $700 Mr. Bunch paid through DCS at the beginning of September, which covered maintenance and child support for that month. *Compare* CP 356 and CP 437. Other amounts may have been paid, but these were the numbers presented by Ms. Lee at the time of the hearing.

Total child support from November 2012 through August 2012 was $5,520.30 (November 2012 through April 2013 at $720.05 per month; May 2013 through August 2013 at $300 per month). CP 4, 47. Spousal maintenance during this period of time was $1,600. CP 437. Combined, these two amounts total $7,120.30, leaving an overpayment of $2,243.70. That Mr. Bunch overpaid and was current in his child support and maintenance obligations is supported by records from the Division of Child Support. CP 356.

Between November 2012 and May 2013, half day kindergarten in lieu of daycare was $420.67 per month. CP 437, 440, 445, 454, 465, 468, 475, 480. Mr. Bunch's proportionate share was $2,187.49 (78% for November 2012 through April 2013, and 52% of May 2013). CP 6, 11, 48. After deducting this amount from what Mr. Bunch admittedly paid, a surplus balance of $56.21 is still left over.

Regarding medical expenses, Ms. Lee claimed Mr. Bunch owed $140 for this time period. CP 437. One of the medical bills Ms. Lee sought reimbursement for - $12 to HHP Primary Care – was paid directly by Mr. Bunch. CP 471. The other bill was for dental services. CP 350, 721. There was no evidence Mr. Bunch agreed to such treatment or agreed to incur these expenses. *Id.* On that basis alone the court's decision to deny reimbursement is supported by substantial evidence. *Id.* However, even if Mr. Bunch agreed to the treatment, his responsibility for the dental bill would have been only $66.56 (52% of 128). CP 487-488.

The remaining expenses claimed by Ms. Lee were for daycare. CP 437. Ms. Lee claimed daycare expenses of $1,248.50 for November 2012 to April 2013, and $624.50 for May 2013 through September 2013. *Id.* Mr. Bunch's proportionate share of these expenses would be $1,298.57. Assuming all these daycare expenses were reasonable and necessary (as required by RCW 26.19.080(4)), or work related and provided by licensed daycare providers agreed to by the parents (as required by the court order at CP 48), this amount is still only about half of what Ms. Lee was requesting in her motion. CP 410. This shows that even Ms. Lee and her attorney were confused about what amount might be owed.

The trial court had serious doubts about whether the daycare expenses were reasonable and necessary, work-related, and provided by licensed day care providers. RP (11/14/13) 25-26. Ms. Lee submitted no

evidence that the daycare was work-related. CP 347-348. At least 18 hours of daycare were not work-related. CP 348-349, 361-364. Ms. Lee also admitted that she was seeking reimbursement for daycare provided by family members she did not pay for. CP 349, 364. Another problem was that some daycare receipts pre-dated the alleged dates of service, and attendance records did not match the invoices. CP 349. At one point Ms. Lee requested $90 reimbursement for daycare expenses paid to Danielle DeBoer in December of 2013. CP 445. But Ms. DeBoer only billed $45 for that month. CP 447. Finally, there was no evidence submitted to show whether the daycare providers were licensed.

Further, Mr. Bunch does not owe daycare expenses unless he first refused to care for the child himself. CP 347, 720. Ms. Lee did not claim that Mr. Bunch was given the opportunity to care for the child and refused. Mr. Bunch alleged that he was never given the opportunity to do so. CP 348.

Even if the materials submitted by Ms. Lee were admissible under the rules of evidence, she failed to submit evidence that the expenses were (1) actually incurred, (2) reasonable and necessary, (3) work-related, (4) provided by licensed day care providers, and (5) incurred after Mr. Bunch was given a right of first refusal. Under the circumstances, the trial court's decision is supported by substantial evidence and should be affirmed. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-352, 77 P.3d 1174 (2003); RCW 26.19.080(4).

4. The trial court properly denied Ms. Lee's request for fees because it did not find Mr. Bunch in contempt, and even if it did, an award of fees is discretionary.

Appellants seem to argue that even if Mr. Bunch was current in his obligations at the time of the motion for contempt, he still should have been found in contempt and assessed attorney fees because he was late in complying with the court orders. Brief of Appellants, pp. 44-47 (appellants' issues 8 and 9). Contempt requires a willful refusal to comply with a court order. RCW 7.21.010. A finding of contempt is within the sound discretion of the trial court, and a reviewing court will not disturb a trial court's contempt ruling absent an abuse of that discretion. *State v. Dugan*, 96 Wn. App. 346, 979 P.2d 885 (1999).

For the reasons discussed above, substantial evidence supports the trial court's conclusion that Mr. Bunch was not delinquent in his support obligations. Even taking Ms. Lee's numbers at face value, Mr. Bunch was current in his payments of child support, maintenance, half day kindergarten, and medical expenses. At best, there were material disputes about whether Ms. Lee was entitled to reimbursement for any daycare expenses. CP 362-367. The sheer volume of materials submitted by Ms. Lee, the disorganized manner in which the materials were presented, and the internal inconsistencies in the documents show how confusing this issue was, even for Ms. Lee and her attorney. Even if the court found that Mr. Bunch owed something, it would have been justified in concluding his actions were not willful. Under the

circumstances, the trial court did not abuse its discretion, and its decision should be affirmed.

Appellants also argue that Mr. Bunch should have been found in contempt for not making property division payments timely. However, the delay in Ms. Lee receiving payments was caused by her own delay and inability to prepare and deliver the proper paperwork. CP 344, 581-582, 595-596; RP (11/14/13) 16-17, 20-21. By acknowledging these amounts were paid *and no longer part of the motion* she waived a finding of contempt on this issue. RP (11/14/13) 16-17, 20-21; *Mid-Town Limited Partnership v. Preston*, 69 Wn. App. 227, 233-34, 848 P.2d 1268 (1993). And even if a contempt finding were not waived on this issue, it is barred by *In re the Marriage of Curtis*, 106 Wn. App. 191, 23 P.3d 13 (2001). Citing this case, counsel suggests a contempt finding for an order dividing property is appropriate. Brief of Appellant, p. 45. But this case stands for the opposite proposition.

Because the trial court did not abuse its discretion in failing to find Mr. Bunch in contempt, an award of attorney fees against him would have been inappropriate. RCW 7.21.030. Even if the trial court found Mr. Bunch in contempt, an award of attorney fees is discretionary. RCW 7.21.030; *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 236 P.3d 981 (2010). Therefore, the trial court did not abuse its discretion in declining to award attorney fees to Ms. Lee.

5. The trial court did not abuse its discretion in awarding CR 11 sanctions against Ms. Carleton because, applying an objective standard, the motion for contempt did not have a sufficient factual basis, and the sanction was reasonable.

The trial court's award of CR 11 sanctions against Ms. Carleton should be affirmed. An award of CR 11 sanctions is reviewed for an abuse of discretion. *Stiles v. Kearney*, 168 Wn. App. 250, 277 P.3d 9 (2012). An abuse of discretion exists if no reasonable person would come to the same conclusion as the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

In reviewing the trial court's award of sanctions, keep in mind that,

> [t]he purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law.

Building Industry Association of Washington v. McCarthy, 152 Wn. App. 720, 745, 218 P.3d 196 (2009) (citations omitted). In determining whether an attorney's investigation into the factual or legal basis for a claim was reasonable, the court applies an objective standard. *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258, *review denied* 121 Wn.2d 1018 (1992). It does not matter how much research and investigation an attorney does, or what the attorney personally believed about the claim. *Id.* If a reasonable attorney under the circumstances would have concluded the claim had no merit then sanctions are appropriate. *Id.*

In applying these standards, courts have held that a party's failure to establish a claim at hearing or trial may be a basis for awarding sanctions. *In re Estate of Tosh*, 83 Wn. App. 158, 920 P.2d 1230, *reconsideration denied, review denied* 131 Wn.2d 1024 (1996). Further, if the trial court awards fees as sanctions, it must limit the fees to the amount reasonably spent in responding to the sanctionable pleadings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007).

In the present case the trial court properly awarded sanctions after concluding appellants failed to produce sufficient admissible evidence at the hearing to support Ms. Lee's claim. CP 608-610; RP (11/14/13) 59-62. Ms. Carleton argues the court made it impossible to prove the allegations by excluding evidence. Brief of Appellants, p. 23. But for the reasons discussed previously in this brief, the trial court properly excluded the evidence. It was not the trial court's duty to ensure that appellants could prove their case. *See In re the Estate of Tosh*, 83 Wn. App. 158 (1996). Rather, it was appellants' duty to submit admissible evidence to substantiate their claims. *Id.*

Similarly, it does not matter how much research and investigation Ms. Carleton conducted prior to filing the motion. *Harrington v. Pailthorp*, 67 Wn. App. 901 (1992). Ms. Carleton argues the court should have allowed her to go into detail about the volume and extent of her pre-filing investigation prior to imposing sanctions. Brief of Appellants, pp. 24-29. But it does not matter how extensive

appellants' investigation was, or what Ms. Carleton may have personally believed after that investigation. *Harrington v. Pailthorp*, 67 Wn. App. 901 (1992). Rather, what matters is whether a reasonable attorney in the same situation would have proceeded with the motion given the information Ms. Carleton had. *Id.*

Whether by choice or lack of competence, Ms. Carleton failed to submit admissible evidence to the court to support the motion for contempt. Even the materials submitted failed to set forth enough information to support a finding of contempt. This is despite counsel trying three or four times to present the same motion to the court. Ms. Carleton was put on notice that the declarations were not under penalty of perjury, as well as several other defects. CP 191-192, 406-408, 725. Despite being put on notice of the defects, Ms. Carleton repeatedly filed defective motions. This added to the parties' expenses. CP 200-208, 580-587. The court only awarded sanctions for four hours of counsel's time, despite a substantial bill and multiple trips to court. RP (11/14/13) 59-62; CP 608-610. Arguably the court could have awarded more in fees for responding to multiple unfounded motions. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007). But the court limited the sanction since this was a first sanction. This decision was within the court's discretion. *Id.*

6. Mr. Bunch should be granted attorney fees and costs on appeal because this appeal raises no debatable issues that would justify reversal of the trial court.

The court of appeals can award fees and costs to a prevailing party if the appeal does not raise debatable issues. RAP 18.9; CR 11. In deciding whether an appeal is frivolous, the court weighs the following factors:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475 (1997), *quoting Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

All the issues in this case turn on whether Ms. Lee and her counsel submitted admissible evidence to support the motion for contempt. The materials submitted to support the motion were not made under oath or penalty of perjury. Appellants were given multiple opportunities to correct this error between the initial filing in August 2013, and the hearing that finally took place in November of 2013. On appeal, appellants admit the materials they submitted were not in the form of an affidavit or declaration as required by RCW 9A.72.085. It is also undisputed that three out of the four requirements for a valid

unsworn declaration are not satisfied. Therefore it cannot be said appellants substantially complied with the statute.

Rather than arguing the trial court made a factual error, or arguing for a good faith extension of the law, appellants ask this court to reverse the trial court because the trial court was not lenient enough with appellants when applying the rules of evidence. Appellants downplay the importance and significance of supporting their claims by *admissible* evidence, arguing the trial court struck their materials, "... because it didn't like the ... attestation clause in the motion." Brief of Appellants, pp. 27-28. This statement suggests that appellants still do not understand the error they made, and instead believe the trial court simply "disliked" the way papers were presented. But this was not a matter of liking what was submitted; it was a matter of making sure the court had reliable and admissible evidence upon which to base its decision.

Rather than demonstrating a clear error by the trial court, appellants compound the problem in their brief by further demonstrating an apparent lack of understanding of the law. Appellants confuse and blur the distinctions between motions, affidavits, declarations, and other pleadings. Beginning at page 38 of appellants' brief appellants cite CR 7, CR 11, and CR 10, to support the argument that the declaration should not have been stricken. But none of these court rules address the elements required to create a valid affidavit or declaration. Appellants blur the requirements in CR 11 that

pleadings signed by an attorney not be submitted for an improper purpose, with the evidence rules that require motions be supported by competent and admissible evidence. This confusion over how to sign a pleading compared to how to present evidence runs throughout appellants' brief to the very end where Ms. Carleton signs the brief, "Sworn to as true and accurate, and subject to the perjury laws of the State of Washington..." Brief of Appellants, p. 49.

Further evidence that the appeal is frivolous is appellants' argument that the trial court erred by not taking testimony about counsel's pre-filing investigation. Brief of Appellants, pp. 25-27. But the question is not how exhaustive counsel's pre-filing investigation was, or what counsel may have personally believed based upon that investigation. *Harrington*, 67 Wn. App. 901 (1992). What matters is whether a reasonable attorney in the same circumstances would have proceeded with the motion. *Id.*

Finally, appellants argue that Mr. Bunch should have been found in contempt for alleged failure to comply with a property division order. Brief of Appellants, p. 45. Appellants cite *In re Marriage of Curtis* to support this argument. *In re Marriage of Curtis*, 106 Wn. App. 191 (2001). But this case stands for the exact opposite proposition: that a party should not be found in contempt for failure to comply with a property division order. *Id.* To get around this problem, appellants suggest that the property division order might have been somewhat

related to child support. But appellants point to no evidence to support this argument.

The preceding examples are only three instances that demonstrate how wholly without factual or legal merit this appeal is. Appellants provide no reasonable argument there was any admissible evidence submitted to support the motion. And even if the court looks at the volumes of documents filed by appellants in the trial court, it is still evident that appellants submitted no evidence the expenses were unpaid, reasonable and necessary, actually incurred, or otherwise reimbursable. Under the circumstances the trial court did not abuse its discretion in not finding contempt and awarding sanctions.

As described by Mr. Bunch and his counsel in the trial court, the manner of presentation of the motions needlessly added to the costs and attorney fees in this matter. CP 200-208, 580-587. Similarly, this appeal also needlessly added to the costs of litigation between the parties. After sorting through all the arguments and analysis, the bottom line is that appellants failed to submit admissible evidence to support their motion to the trial court, they failed to prove their case below, the trial court awarded a modest amount of sanctions, and appellant has now failed to demonstrate why the trial court was wrong in doing so. The purpose of awarding fees as sanctions for a frivolous filing is both to discourage such actions, but also to compensate the other party for responding to such frivolous claims. *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 745, 218

P.3d 196, 208 (2009); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007). Under the circumstances, Mr. Bunch asks that the court permit him to submit a fee and cost bill as provided by RAP 18.1 upon a finding by the court that this appeal is frivolous.

Conclusion

The trial court should be affirmed. The trial court did not abuse its discretion when it excluded materials not presented under penalty of perjury, or were otherwise inadmissible for not being based upon personal knowledge and containing hearsay. It was not the trial court's duty to ensure that appellants could prove their case. Similarly, it was not error for the trial court to award sanctions for filing a baseless motion when none of the materials submitted by appellants were admissible. Because it was a first sanction, the trial court properly awarded a modest amount for sanctions, which should be affirmed. Mr. Bunch asks for an award of fees for defending against this frivolous appeal.

Respectfully submitted this 24th day of July, 2014.

BLADO KIGER BOLAN, P.S.

Douglas N. Kiger, WSBA #26211
Attorney for Daniel E. Bunch,
Respondent

Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of July, 2014, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Eva Carleton Attorney at Law 13115 Muir Drive NW Gig Harbor, WA 98332	Jeffrey A. Robinson Rainer A. Frank 4700 Point Fosdick Drive, NW Suite 201 Gig Harbor, WA 98335

via U.S. Mail, first class, postage pre-paid.

Dated this 24th day of July, 2014, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.

Heather D. Alderson
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